Supreme Court, U.S.
FILED
MAY 6 1986
JOSEPH F. SPANIOL, JR
CLERK

No. 85-1569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MERLE W. DAMERON,
Petitioner,

v.

WASHINGTON MAGAZINE, INC.
LARRY VAN DYNE and DANIEL RAPOPORT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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May 6, 1986

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TABLE OF CONTENTS

Page

I. RESPONDENTS' BRIEF MISCHARACTERIZES THE CONSTITUTIONAL ISSUE ON WHICH PETITIONER SEEKS REVIEW, NAMELY, THE SCOPE AND VIABILITY OF THE INVOLUNTARY PUBLIC FIGURE DOCTRINE 2

II. RESPONDENTS RAISE EXTRANEOUS LEGAL CONSIDERATIONS THAT MAY ONLY BE PROPERLY ADDRESSED ON REMAND FOLLOWING RESOLUTION OF THE INVOLUNTARY PUBLIC FIGURE ISSUE 6

III. THIS COURT'S RECENT DECISION IN *PHILADELPHIA NEWSPAPERS, INC. v. HEPPS* HEIGHTENS THE NEED FOR REVIEW OF THE INVOLUNTARY PUBLIC FIGURE ISSUE PRESENTED IN THIS CASE 8

TABLE OF AUTHORITIES

Cases: Page

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 5
Dun & Bradstreet v. Greenmoss Builders, —— U.S. ——, 105 S. Ct. 2939 (1985) 1
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) ..... *passim*
Philadelphia Newspapers, Inc. v. Hepps, 54 U.S.L.W. 4373 (U.S. Apr. 22, 1986) 2, 8, 9
Powell v. McCormack, 395 U.S. 386 (1969) 7
Time, Inc. v. Firestone, 424 U.S. 448 (1976) 5
United States v. Donnelly Estate, 397 U.S. 286 (1970) 8

Other Authorities:

Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 Bus. Law 709 (1978) 4
Comment, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 Va. L. Rev. 931 (1983) 5
Comment, *Fame and Notoriety in Defamation Litigation*, 34 Hastings L.J. 809 (1983) 4
Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1975) 4
Note, *Public Figures, Private Figures and Public Interest*, 30 Stan. L. Rev. 157 (1977) 4

PETITIONER'S REPLY BRIEF

Petitioner is an "ordinary citizen" who "by sheer bad luck" became "involuntarily embroiled" in a "public controversy" (i.e., an airplane crash) in 1974. App. A at 9a; 11a-12a.[1] Eight years later petitioner was defamed by an article that appeared in *The Washingtonian* magazine on air traffic safety. App. A at 2a-3a. He subsequently sued for libel.

Although petitioner (a) did not "inject" himself into the 1974 air crash accident, (b) had no "desire" to be a part of the ensuing investigation, and (c) was "completely unknown" to the public prior to that event, the Court of Appeals nonetheless seized upon dicta in *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345 (1974), to find that he was an "involuntary public figure." App. A at 9a; 10a; 11a. Accordingly, petitioner's burden of proof was escalated from simple negligence to the "almost impossible level" of the *New York Times* malice standard. *Dun & Bradstreet v. Greenmoss Builders*, —— U.S. ——, 105 S. Ct. 2939, 2952 (1985) (White, J., concurring). Because petitioner did not allege that *The Washingtonian* had published the disputed report with constitutional malice, his suit was dismissed. App. A at 14a.

Petitioner disputes his classification as an involuntary public figure. Moreover, he contends that the Court of Appeals' holding constitutes bad public policy which, unless reversed, will leave "hapless private citizens, who through no fault of their own are suddenly caught up in a public controversy . . . with virtually no recourse if defamed." Pet. at 22.[2] He has therefore sought this Court's review on:

> Whether the Court of Appeals' interpretation of the "involuntary public figure" doctrine is compati-

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[1] "App. A" citations refer to the Court of Appeals decision which is reproduced in Appendix A to the petition for certiorari at 1a-14a.

[2] "Pet. at ——" citations refer to the petition for writ of certiorari.

> ble with this Court's repeated insistence that an ordinary citizen may become a limited purpose public figure only by voluntarily engaging in purposeful activity which thereby increases the risk of media exposure and defamation.

Pet. at (i).

Respondents' Brief in Opposition [3] obscures rather than addresses this central issue. It repeatedly mischaracterizes petitioner's arguments, misstates relevant case holdings and dismisses out of hand the fundamentally irreconcilable divisions of opinion that have appeared within the federal and state judiciary on this question. It further raises extraneous legal questions regarding petitioner's purported "public official" status and the sufficiency of his evidence of respondents' fault that may only be properly disposed of on remand, following a review of the Court of Appeals' involuntary public figure holding.

Petitioner therefore replies to respondents' attempts to minimize the importance of this case and also comments briefly upon how this Court's recent decision in *Philadelphia Newspapers, Inc. v. Hepps*, 54 U.S.L.W. 4373 (U.S. Apr. 22, 1986) heightens the need for review of the substantial constitutional issues presented therein.

I. RESPONDENTS' BRIEF MISCHARACTERIZES THE CONSTITUTIONAL ISSUE ON WHICH PETITIONER SEEKS REVIEW, NAMELY, THE SCOPE AND VIABILITY OF THE INVOLUNTARY PUBLIC FIGURE DOCTRINE.

Respondents' Brief in Opposition repeatedly mischaracterizes the specific constitutional issue on which certiorari is sought: namely, "the proper scope and continuing viability of the involuntary public figure doctrine." Pet. at 10. Thus, for example, respondents variously contend that petitioner is asking this Court to revisit "the limited purpose public figure doctrine" *in toto*, Resp. Br. at 6, or is in some way "question[ing] the [overall] workability

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[3] Hereafter cited as "Resp. Br. at ——".

of the *Gertz* principles." *Id.* at 8. But however much it may suit respondents' purpose to suggest that petitioner has mounted a broad and undifferentiated challenge to the limited purpose public figure doctrine or is effectively requesting that *Gertz* be overruled, such is not the case. As demonstrated in the Petition, *Gertz* delineated three classes of public figures. Pet. at 12. It is the third and most ambiguous category—wherein Justice Powell hypothesized a class of involuntary public figures—about which further clarification is sought.

Because respondents are either unwilling or unable to make any distinctions among the three classes of public figures enumerated in *Gertz*, they are led to make a series of outlandish assertions. Respondents claim, for instance, that: "Significantly, petitioner cites no case to support his claim that the limited purpose public figure doctrine is in disarray." Resp. Br. at 8. But petitioner is making no such unbounded claim. To reiterate, certiorari is sought because of the substantial disagreement over the proper dimensions of the *involuntary* public figure doctrine.[4] Moreover, four and a half pages of petitioner's certiorari brief are given over to a discussion of over one dozen federal cases from the Second, Third, Fifth, Sixth, Seventh, Tenth and District of Columbia Circuits demonstrating the incongruous results engendered by regular application of the involuntary public figure doctrine. Pet. at 12-16. Respondents' brief makes no serious attempt to reconcile these inconsistencies.[5] Instead it

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[4] The "limited purpose public figure" category has been defined by this Court to comprise individuals who "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. It rests upon *voluntary* assumption of the risk of defamation. The *involuntary* limited purpose public figure category, as its name implies, does not. It is this distinction which continually eludes respondents in their opposition brief.

[5] Respondents' "response," such as it is, is to claim that "[d]ifferent individuals in different situations have qualified under the *Gertz* guidelines as public figures"—a proposition with which no

merely states what should be obvious, i.e., that all the circuit courts are attempting to "adhere to the guidelines established in *Gertz*," Resp. Br. at 8, and in place of any meaningful analysis offers a pointless string citation of cases. *Id.* at n.4.

Respondents also peremptorily assert that "virtually no authority—judicial or academic— . . . seriously questions the workability of the *Gertz* principles." But again, to the extent that respondents are inartfully using the term "*Gertz* principles" to signify the involuntary public doctrine—the only specific constitutional concept whose workability petitioner questions—this assertion is false. In addition to the numerous cases and legal commentators cited at pages 12-16 of the certiorari brief to substantiate this claim, petitioner also respectfully asks the Court to examine the legal authorities contained in the accompanying footnote.[6] The confusion is manifest.

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one, least of all petitioner, can disagree. Resp. Br. at 7. In making this unremarkable assertion, however, respondents fail completely to reply to petitioner's argument that different federal circuit courts construing the involuntary public figure doctrine with approximately *the same individuals* in approximately *the same situations* have reached glaringly inconsistent results both as to the doctrine's meaning and as to its scope. Pet. at 15-16.

[6] *See, e.g.*, Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1422-23 (1975) ("Despite [its] emphasis on voluntary exposure, the [*Gertz*] Court appeared to acknowledge . . . [an] involuntary public figure class. . . . The Court is speaking in riddles here."). Contrast Note, *Public Figures, Private Figures and Public Interest*, 30 Stan. L. Rev. 157, 170 (1977) ("the [involuntary public figure] possibly remains theoretical because the Court has confined its analysis to *voluntary* acquisition of public figure status.") with Bamberger, *Public Figures and the Law of Libel: A Concept in Search of a Definition*, 33 Bus. Law. 709, 722-23 (1978) (stating involuntary public figure concept is being robustly applied). *See also* Comment, *Fame and Notoriety in Defamation Litigation*, 34 Hastings L. J. 809, 817 n.3 (1983) (stating that *Gertz's* involuntary public figure concept "seems to have been foreclosed by later opinions.")

The decisional law of this Court fares no better under respondents' indiscriminate analysis. For exmple on page 9 of their brief, respondents refer to the plaintiffs in *Curtis Publishing Co. v. Butts* as an appropriate model of the "involuntary public figure" hypothesized by *Gertz*. In fact, however, Justice Harlan's plurality opinion for the Court explicitly states that Butts' public figure status was achieved as the result of the "substantial amount of independent public interest [he commanded] at the time of the [defamatory] publication." 388 U.S. 130, 154 (1967). In other words, it was Butts' pervasive notoriety as a result of "his prior [voluntary] activities" in courting public attention that led to public figure status being imposed upon him. *Id.*

Similarly, respondents rewrite what they term "the public figure analysis set forth in *Gertz*," Resp. Br. at 9, to omit completely the Court's emphasis on the determinative role voluntary injection into a controversy plays in sacrificing an ordinary citizen's reputational rights to the general societal interest in robust debate on matters of public concern. *See Gertz*, 418 U.S. at 344-45. Last and perhaps most egregiously, *Firestone*, *Hutchinson* and *Wolston*—cases in which the Court's emphasis on voluntary action is manifest throughout—are collectively cited for the erroneous proposition that public figure status depends "on whether the individual plays a central role in [a public] controversy." Resp. Br. at 10.[7] Contrast, Pet. at 17-19.

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[7] Clearly, *Time, Inc. v. Firestone* reintroduced a "public controversy" element into the Court's limited purpose public figure test. 424 U.S. 448, 453 (1976). *See also* 424 U.S. at 487-89 (Marshall, J., dissenting from *Firestone*'s use of a "public controversy" element in this test as opposed to *Gertz*'s exclusive focus on "voluntariness"). But the existence or not of a public controversy was never intended by itself to increase the level of constitutional protection afforded a libel defendant. Rather it is properly viewed as an additional condition prerequisite so that if both voluntariness *and* a public controversy exist only then does an otherwise private figure libel plaintiff qualify as a public figure. *See generally*, Comment, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 Va. L. Rev. 931, 940 (1983).

In sum, respondents offer nothing more than a series of unfounded mischaracterizations and tendentious case readings to support their contention that a review of the involuntary public figure doctrine is unwarranted.

II. RESPONDENTS RAISE EXTRANEOUS LEGAL CONSIDERATIONS THAT MAY ONLY BE PROPERLY ADDRESSED ON REMAND FOLLOWING RESOLUTION OF THE INVOLUNTARY PUBLIC FIGURE ISSUE.

Respondents claim that even if the Court of Appeals' classification of petitioner as an involuntary public figure was erroneous, review of that decision is unnecessary for two reasons. First, respondents argue that petitioner is a "public official" and would therefore still be required to prove constitutional malice, a burden which petitioner concedes he cannot surmount. Resp. Br. at 11-13. Second, respondents assert that even if petitioner is a private citizen, they were without fault in publishing the defamatory news report at issue. Resp. Br. at 13-15.

Petitioner does not dispute the sincerity of respondents' belief in either of these propositions.[8] What is disputed, however, is respondents' transparent attempt to place undeveloped factual issues before this Court that may only be properly addressed on remand following resolution of the involuntary public figure question. For although the record here adequately contains all the facts necessary to review the Court of Appeals' legal conclusion that petitioner is an involuntary public figure, the same may not be said of respondents' dubious "public official" or evidentiary claims.

Indeed, the district court considered and rejected respondents' claim that petitioner was a public official. *See*

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[8] However, this is not to suggest that he concedes either point. On the contrary, petitioner has vigorously and successfully contested respondents' attempts to have him classified as a public official throughout the course of this litigation. Moreover, petitioner maintains that ample evidence of respondents' negligence exists to support a jury verdict against them.

App. B [9] at 16a and fn. 3.[10] This holding was not addressed by the Court of Appeals which found no reason to reach this issue given its conclusion that constitutional considerations elevated petitioner to the status of an involuntary public figure. App. A at 14. Thus, the only authoritative judicial determination in this case to date belies respondents' claim that petitioner is a public official. Even assuming that that determination was, as respondents assert, not "definitive", Resp. Br. at 12, it would contravene long-standing principles regarding the orderly administration of justice for this Court to pass upon this issue before the lower courts were given the opportunity to make further factual findings regarding petitioner's public official status *vel non*. *See e.g.*, *Powell v. McCormack*, 395 U.S. 486, 550 (1969) (where a federal court of appeals has misconceived the applicable constitutional law and has therefore failed to pass upon subsidiary factual questions, this Court's general practice is to remand the case to the lower court for consideration on the remaining issues).

In sharp contrast, the specific question on which petitioner seeks certiorari springs entirely from the Court of Appeals' unbridled extension of the "involuntary public figure" dicta in *Gertz*. This is a purely *legal* matter which, unless reviewed, will become embedded in the constitutional libel jurisprudence of the District of Columbia Circuit. Not only would such a result work a severe hardship on the legitimate reputational interests of private citizens residing in this jurisdiction but it would also resurrect the discredited *Rosenbloom* "public inter-

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[9] "App. B" citations refer to Appendix B to the petition for certiorari which contains the United States District Court Opinion below.

[10] The district court stated: "Contrary to defendants' assertion, not every individual performing work which 'citizens have entrusted to government' . . . [illegible] public official within the meaning of the defamation laws." Citing *Jenoff v. Hearst Corp.*, 644 F.2d 1004 (4th Cir. 1981); and *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

est" standard thereby perpetuating confusion in this area of the law. *See* Pet. at 20-22; *infra* at 9-10.

Respondents' second claim that no evidence of fault exists goes to the sufficiency of petitioner's evidence. Not only is this factual matter similarly undeveloped, but the district court reached the entirely opposite conclusion. It found that "there would be a[] [triable] issue of fact on the question whether defendants acted negligently" if petitioner had not been required to prove actual malice. App. B at 16a. In any event, both lower courts reviewed such evidence as was available at the preliminary summary judgment phase of this proceeding under the much more demanding actual malice standard of proof. Consequently, this contention is only appropriately disposed of on remand after this Court has had an opportunity to determine petitioner's proper constitutional status as either a private or public figure. *Cf., United States v. Donnelly Estate*, 397 U.S. 286, 295 (1970) (upon reversing appellate court and rejecting basis on which that court upheld district court's grant of summary judgment, this Court will remand case for further proceedings and will not rule on defendants' additional defenses which were not considered by either district or appellate courts).

III. THIS COURT'S RECENT DECISION IN *PHILADELPHIA NEWSPAPERS, INC.* v. *HEPPS* HEIGHTENS THE NEED FOR REVIEW OF THE INVOLUNTARY PUBLIC FIGURE ISSUE PRESENTED IN THIS CASE.

One month after certiorari was filed in this proceeding, a decision was released in the *Philadelphia Newspapers, Inc. v. Hepps* libel case. 54 U.S.L.W. 4373 (U.S. Apr. 22, 1986). At issue there was whether the common law presumption that defamatory speech is false should stand when a plaintiff seeks damages against a media defendant for speech of public concern. Fairly read, both majority and dissenting opinions add further support to petitioner's claim that the Court of Appeals' decision to

revitalize the involuntary public figure doctrine is in error.

For example, in its review of this Court's previous libel precedents, the majority opinion stresses that limited purpose public figure status is not achieved unless the putative libel plaintiff has "access to media channels useful for counteracting false statements" and has "not *voluntarily* placed [himself] in the public eye." 54 U.S.L.W. at 4374, citing *Gertz*, 418 U.S. at 341. (Emphasis added). *Hepps'* restatement that voluntary action, akin to assumption of risk, is the determinative factor in the limited purpose public figure equation supports petitioner's argument that the continuing viability of the *involuntary* limited purpose public figure doctrine is questionable. Pet. at 17-19. *See also Hepps*, 54 U.S.L.W. at 4378 (Stevens, J., dissenting) (private persons are "more deserving of recovery" because they have "relinquished no part of [their] good name[s]" by "thrusting themselves to the forefront of particular controversies. . . ." (citation omitted)).[11]

The certworthiness of this case is also exemplified by a careful reading of the *Hepps* dissent. There Justice Stevens, speaking for three other members of this Court (Justices Rehnquist, Burger and White) warned that the majority's willingness to extend constitutional protection to all speech of public concern would lead to a return of the "discredited analysis of the *Rosenbloom* plurality." 54 U.S.L.W. at 4379. *Cf.*, Petition at (i), Question 2. But the Court of Appeals' decision has already effectively reinstated the *Rosenbloom* plurality holding. Not only does it " 'tip [the scales] in favor of protecting . . . speech' . . . merely because that speech addresses 'matters of public concern,' " 54 U.S.L.W. at 4379 (citations omitted), but it would afford the maxi-

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[11] Thus as recently as two weeks ago *all* nine members of this court stressed voluntariness as the key element of limited purpose public figure status—an element completely disregarded by the lower court's decision.

mum amount of constitutional protection to a speaker (i.e, the actual malice privilege) merely because the speech at issue involved a "public controversy." *See generally*, Pet. at 20-22. Consequently, the need for review of that decision is paramount.

CONCLUSION

For the foregoing reasons and those stated in our initial Petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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